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NO. 87-5428

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK, Warden, etc.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF SOUTH DAKOTA, ET AL.

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INTEREST OF THE AMICI CURIAE

Pursuant to Rule 36.4 of the Rules of this Court, the State of South Dakota and those States listed in the Appendix submit this brief as amici curiae in support of the Respondent, Larry Lack, Warden of the Middle Tennessee Reception Center. The amici States above-named believe firmly that habeas corpus litigation must have an end. All of these

States litigate habeas corpus petitions before the federal courts on a regular basis. They seek to make certain that once a denial of habeas corpus takes place, that the denial will be final unless the Petitioner appeals within the time as provided by Federal Rules of Appellate Procedure, Rules 3 and 4.

If these rules are not followed, this Court ordinarily holds that the matter may not be considered by the Court of Appeals unless very extraordinary circumstances exist. Where, as here, an opportunity existed to extend the time for filing of a notice of appeal, the States believe that it is not unfair to require the habeas petitioner to comply. Many states do not even provide, in the case of State habeas corpus or direct appeal, that the time for filing a notice of appeal may be extended. See e.g. S.D. Cod. L. Ann. §§ 15-26A-6 (1984) and 23A-32-16 (Supp. 1987). It has never

been thought that these provisions, or for that matter, those of Rules 3 and 4, are in any way violative of the rights of prisoners or other indigent persons. See United States v. Robinson, 361 U.S. 220, 224 (1960).

The States have a great interest in finality of litigation. They also have an interest in preventing prisoners in their institutions from claiming delivery of mail to institutional authorities when the mail has not arrived or has not been filed in the appropriate courts until after the requisite filing date. These States, therefore, respectfully request that this Court affirm the determination of the United States Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

Under Federal Rules of Appellate Procedure, Rules 3 and 4, and 28 U.S.C. § 2107, the United States Court of Appeals has no jurisdiction over a civil appeal

unless a notice of appeal is filed with the United States District Court within thirty days of entry of judgment. Although other defects may be waived, the failure to file a notice of appeal within thirty days renders the appeal invalid, and deprives the court of appeals of jurisdiction to hear it. F.R.A.P. Rule 3(a); 28 U.S.C. § 2107; Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251 (1986); Griggs v. Providence Consumer Discount Co., 459 U.S. 56 (1982); Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257; reh'g. denied 434 U.S. 1089 (1978).

This Court has been very firm in requiring filing of a notice of appeal as a prerequisite to appeals court jurisdiction. See cases cited above; See also Berman v. United States, 378 U.S. 530 (1964); United States v. Robinson, 361 U.S. 220 (1960). The reason for this rule was outlined in Browder,

434 U.S. at 264. The rule sets a definite point of time when litigation shall be at an end. This interest in finality is exactly that asserted by the State of Tennessee and the amici States in this case.

The amici States recognize that this Court has, from time to time, recognized exceptions to this rule. Although these exceptions tend to blur the bright line rule, the amici States do not request that this Court overrule the cases establishing these exceptions. They do argue that this case does not come within the recognized exceptions. See, e.g., Fallen v. United States, 378 U.S. 139 (1964). Appellant in this case did not do all that he could to give notice of appeal within the time allowed. He could have mailed the notice of appeal earlier. He could also have moved for an extension of time within which to file the notice of appeal. Factually, the record

shows that the notice of appeal arrived late because Petitioner mailed it to the wrong address. See Resp. Br. at n. 1, Statement of Case; Argument, II. B. The prison authorities mailed the letter the same day it was received. JA 28.

In addition, Fallen was a criminal case. The amici States argue that the civil statute, 28 U.S.C. § 2107, is not governed by Fallen.

The amici States also request that this Court not go behind the Clerk's file stamp. If a bright line rule is to be established and maintained, this Court should accept the clearly marked file stamps of the clerks of the various United States District Courts. It is also to be noted that Petitioner was given an opportunity to present arguments and facts showing incorrectness of the file stamp. No substantial doubt has been cast on the file stamp's accuracy. Petitioner also had counsel appointed before the court of

appeals. JA 29. In spite of this, the record shows that Petitioner gave the notice to prison authorities on January 27, 1986, and they mailed it on January 27, 1986. JA 28. It was received by the United States District Court for the Western District of Tennessee, Eastern Division, on February 7, 1986. Petitioner addressed the notice to the wrong court. JA 28. This showing falls short of showing any probability that the notice of appeal was received on a date earlier than the filing date.

Petitioner also fails to show "unique circumstances" in accord with the decision in Harris Truck Lines Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) and Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964). In these cases, the court found reasonable reliance upon explicit rulings or statements of the trial courts in granting extensions or ruling

on other motions. In the case at bar, however, Petitioner neither sought nor obtained a ruling that he had additional time within which to file his notice of appeal, nor did he ask for a new trial or hearing. The district court never considered that question, but proceeded with the normal processing of an appeal. The court of appeals did likewise until the lack of jurisdiction was called to its attention. It then asked Petitioner to explain the apparent lack of jurisdiction, JA 23-24. Petitioner then attempted to do so, JA 26-28, and the court of appeals appointed counsel to assist. JA 29.

The amici States also request that this Court not construe the notice of appeal as a motion to extend the time within which to file. Petitioner did not make a motion for such relief, which Rule 4(a)(5) specifically requires. Had Petitioner moved the district

court for additional time, he would have been within the rule. He did not do so, and thus is not entitled to an extension.

The States also submit that this Court should not cast about for a reason to validate the appeal in this case for policy reasons unique to the writ of habeas corpus. Although habeas corpus is, as Petitioner points out, the key to the prison door, it is also significantly intrusive into the workings of the state courts, and causes much friction in the relations between the national government and the states. See Stone v. Powell, 428 U.S. 465, n. 31 at 491-492 (1976). Certainly, where a single district judge, and on appeal, the courts of appeals, are permitted to overrule the judgments of state courts, the states and their courts are entitled to an interpretation of federal rules of finality

as favorable as that granted to private litigants.

In addition, this case might be a proper subject for relief under Fed. R. Civ. Pro. 60(b), relief from judgment. This rule is broad in its application, and is the preferred method for relief from judgment in a civil case. Other methods have been abolished, and Rule 60(b) is intended to cover the field. See Advisory Comm. Note, F.R.C.P. 60(b), 1946 Am. Where this avenue remains open to Petitioner, he should not be granted an exemption from normal jurisdictional rules.

ARGUMENT

IN ABSENCE OF A TIMELY NOTICE OF APPEAL, OR AN EXTENSION OF THE TIME WITHIN WHICH TO FILE, THE COURT OF APPEALS LACKS JURISDICTION OVER PETITIONER'S APPEAL; IN ADDITION, NO EXCEPTION TO THE TIMELY FILING OF A NOTICE OF APPEAL HAS BEEN SHOWN TO EXIST IN THIS CASE.

A. Timely filing of a notice of appeal is jurisdictional.

As Petitioner concedes in his brief, the timely filing of a notice of appeal is jurisdictional. In the absence of a timely filing, an appeal must be dismissed for want of jurisdiction. PET. BR. at 18, citing United States v. Robinson, 361 U.S. 220, 224 (1960). Federal Rules of Appellate Procedure, Rules 3, 4 and 26(b) reinforce this rule. Rule 3(a) provides that "failure of appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . . ." (Emphasis supplied.) Rule 4(a)(1) provides the time, thirty days, within which notice of appeal must be filed, except in cases involving the United States or an officer or agency thereof as a party. Rule 4(a)(5) provides that the district court upon a showing of excusable neglect or good cause may extend the time for filing a notice of appeal upon a motion filed within thirty days after the expiration of

the appeal time. Rule 26(b) prohibits the court of appeals from extending the time for filing a notice of appeal.

The 1979 amendments to Rule 4(a) provide that an additional ground, good cause, may be cited as a reason for extending the time for notice of appeal. Previously, excusable neglect, a higher standard, had been required. The 1979 amendment also clarified the time periods, and specifically required the filing of a motion to extend within thirty days. See Advisory Committee Note, 1979 Amendment, Rule 4(a)(5). The intent of the amendments was to clarify the rule and promote finality and certainty in application for extension and running of the appeal time. The amendment also makes it easier to gain an extension, while requiring a motion (rather than a "request") to obtain the extension. These amendments specifically negate Petitioner's argument that a late notice of

appeal should be construed as an application for additional time. When a document is to be construed as something other than what it purports to be, the rules specifically provide for this construction. See F.R.A.P. 22(b) (certificate of probable cause to appeal).

The amici States also contend that 28 U.S.C. § 2107 provides the outer limits within which an appeal may be taken, or within which an extension of time for filing a notice of appeal may be granted. The time limits in § 2107 are consistent with those in Rule 4. The fact that the Congress has, however, adopted a specific statutory time within which an appeal may be filed makes it much more difficult for Petitioner to argue that the time period may be disregarded. When this Court is interpreting a congressional enactment providing for jurisdiction of the court, it seeks out the

intent of Congress. Congressionally mandated jurisdictional limits may not be overcome by equitable arguments, even in situations that might call for such a result under a court rule. See Coopers and Lybrand v. Livesay, 437 U.S. 463, 472-475 (1978).

This Court, in interpreting the provisions of Rules 3 and 4, has held that they are "mandatory and jurisdictional." Browder v. Director, Illinois Department of Corrections, 434 U.S. 257, 264 (1978). This Court has occasionally found exceptions to strict compliance with Rules 3 and 4, see e.g. Fallen v. United States, 378 U.S. 139 (1964); Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964). These exceptions have, however, always been strictly construed, and it is the rare case indeed in which this Court will permit a late filing to confer jurisdiction upon a court of appeals. See Browder, 434 U.S. at 264;

Griggs, 459 U.S. at 61; Berman v. United States, 378 U.S. 530 (1964). The requirement of filing a timely notice of appeal was applied to a habeas corpus case (albeit to the disadvantage of the State, not the petitioner) in Browder. The court required timely filing of the notice of appeal in two recent per curium opinions, even though an early notice of appeal had been filed, and it became ineffective due to the filing of other motions in the district court. Acosta v. Louisiana Department of Health and Human Services, 478 U.S. 251 (1986); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Fallen and Thompson have generally been restricted to their facts. In Fallen, the Court held that the petitioner did all that he could reasonably have been required to do by delivering a notice of appeal to his custodians within the time permitted. In Thompson, the petitioner reasonably relied on

direct statements of the district court to the effect that his motion extending the appeal time was filed on time. Exceptions to timely filing requirements have, ordinarily, been set forth in the rules and have not been constructed on a case-by-case basis. See F.R.A.P. 4(a)(2); 4(a)(5).

This Court in Browder set forth the reasoning behind requiring a notice of appeal for jurisdiction of the court of appeals. The other litigants are entitled to be free of the demands of the appellant unless the notice of appeal is filed on a timely basis. It is not difficult to file a notice of appeal within the time required. No particular technical forms are necessary, and a less than artfully drafted notice of appeal is sufficient. See JA at 21. In addition, not only may the notice of appeal be relatively informal, but the time for filing may be extended, if motion for extension is

made within the time permitted for appeal, plus thirty days. Since 1979, the appellant need not show excusable neglect, but only good cause. Filing of a notice of appeal within the time required thus is not onerous.

Given these minimal requirements, it is not unfair to prohibit an appellant from coming into court and claiming that he has delivered notice of appeal to prison authorities or to the post office for mailing, but that it did not arrive in time. This Court has routinely rejected such equitable pleas on the basis that filing is jurisdictional, and that the would be appellee has a right to finality once the appropriate period has run. If a factual inquiry can be made into each individual case, there would be no bright line rule and the interest of finality so carefully guarded by this Court and the Federal Rules of Appellate Procedure would be defeated. In

order to promote these goals, this Court should strictly adhere to the rules requiring either a notice of appeal within thirty days, or a motion to extend the time for filing within sixty days.

B. Application of Fallen to this case.

Petitioner's initial claim is that this case is governed by Fallen v. United States, 378 U.S. 139 (1964). Fallen held that strict compliance with the rule requiring filing of a notice of appeal in a criminal case within ten days would not be required where it "could not be fairly exacted." Initially, this holding would seem to conflict with the other, and more recent, holdings of this Court stating that the filing of the notice of appeal is "mandatory and jurisdictional." The amici States believe, however, that this Court would continue to apply the Fallen rule to those circumstances where no reasonable alternative existed for a criminal appellant

to the late filing of a notice of appeal. Contrary to the argument of appellant at pages 18-19 of his brief, Fallen does not signal a broad based exception to the normal jurisdictional requirements for courts of appeal. Rather, this Court will adhere to the rules where reasonable alternatives exist for a Petitioner.

In this case, compliance with the rule is not unreasonable for several reasons. First, the record shows that Petitioner sent the notice of appeal to the wrong court. JA 28; see Resp. Br. at n. 1, Statement of Case; Argument at II. B. Had he addressed it properly, it probably would have arrived on time. Second, the prison mail log shows that prison authorities sent the notice of appeal the same day it was presented to them. JA 28. Third, Petitioner had thirty days within which to file a notice of appeal. He did not mail the notice of appeal until some twenty-seven days after the judgment was

rendered. In Fallen, on the other hand, Petitioner had only ten days, and mailed the notice of appeal on the eighth day. In addition, Petitioner could have moved for additional time within which to file his notice of appeal under Rule 4, and the motion could have been heard ex parte if filed within thirty days. If filed outside thirty days, but within sixty days, the motion needed to be made upon reasonable notice to Respondent.

Unlike the petitioner in Fallen, who had only ten days, and who was paraplegic and ill, there is nothing in the record of this case that indicates the impossibility of filing the notice of appeal within the time required. Indeed, if Petitioner had addressed the envelope properly, his notice probably would have arrived on time. Although Petitioner cites absence of legal materials, transfer to a new facility, and a daily

regimen he was required to follow, none of these prevented him from mailing and addressing his envelope properly or sending it earlier than twenty-seven days after judgment.

In addition, as argued by Respondents, Fallen was a criminal case. It was not subject to the jurisdictional limits of 28 U.S.C. § 2107. This Court will not make exceptions to congressionally mandated jurisdictional limits. See supra at 13-14.

C. A factual evidentiary hearing is not required as to date of arrival of the notice of appeal.

At pages 25-29 of his brief, Petitioner argues that he should be granted an evidentiary hearing on the question of whether the notice of appeal arrived at the clerk's office prior to the date upon which it was filed. This Court should not permit such a hearing in this case for two reasons. First, in the absence of some unusual

circumstance indicating that the clerk's filing stamp is incorrect, a presumption of correctness exists. 28 U.S.C. § 1733; See Fed. R. Evid., Rules 301, 803(8); Chandler v. Roudebush, 425 U.S. 840, n. 39 at 863 (1976); Evanston v. Gunn, 99 U.S. 660 (1879); United States v. Ross, 92 U.S. 281 (1876). The purpose of having the clerk file stamp documents is to promote clarity and reduce any possible dispute about when a document was actually received. While the amici States concede that in unusual circumstances (such as Ward v. Atlantic Coast Line R. Co., 265 F.2d 75 (5th Cir. 1959), rev'd on other grounds, 362 U.S. 396 (1960), where a clerk's office was closed on normal business days), that an evidentiary hearing might be appropriate, the Petitioner has alleged no such circumstances in this case. If such unusual circumstances existed, they certainly could have been pointed out to the court of

appeals. Petitioner had counsel at the court of appeals level.

Second, the rule requires filing within thirty days. If the court makes a regular practice of going behind the file stamp, the purpose of promoting clarity and finality in litigation would be significantly eroded. Petitioner should be required, at a minimum, to make a showing that some unusual circumstance existed, such as closure of the clerk's office at the date when the notice of appeal should have been received. The fact that it took three or four days for the mail service to deliver the notice of appeal, plus speculation as to why other notices or briefs arrived at the time that they did, is simply insufficient to overcome the presumed correctness of the clerk's filing stamp. See Fed. R. Evid. Rules 301, 803(8).

D. The principals of Harris Trucklines Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) do not apply to this case.

Petitioner next contends that the case of Harris Trucklines Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) excuses his late notice of appeal, or should permit him to now ask for an extension of time. The circumstances in that case, however, are quite different from those here. Apparently, the trial judge in Harris specifically granted an extension of time within which to file a notice of appeal, where he did not have the power to do so. The Appellant then specifically relied upon this grant and failed to file notice of appeal within the original time, but did file within the extended time. In this case, Petitioner claims that since the appeal was processed in the normal fashion, and was not dismissed until after his time for requesting an extension had expired, that unique circumstances are present here.

Petitioner's argument is unsupportable for several reasons. First, Petitioner did not move that the time for filing a notice of appeal be extended, as required by the rules. Rule 4 makes such a motion jurisdictional. Second, Petitioner did not request relief under F.R.C.P. 60(b), even after the court of appeals requested that he explain his late filing, and even after counsel was appointed. The amici States recognize that the court of appeals could not have entertained such a motion. F.R.A.P. Rule 26(b). Petitioner did not, however, request any such relief from the district court.

Third, neither the district court nor the court of appeals ever told Petitioner that he had any longer period than thirty days within which to file his notice of appeal, as was the case in Harris. Rather, the courts and their clerks proceeded to process the appeal in the normal fashion

until such time as they noticed that the appeal had not been timely filed. Petitioner cannot rely on this processing of the appeal to the extent he would be entitled to rely on an explicit statement that he had additional time within which to file. His notice of appeal was late before his appeal was processed. Unlike the appellant in Harris, he cannot claim detrimental reliance on district court actions. Normal procedures of a clerk's office should not be held to create jurisdiction by estoppel.

E. Under the Rules of Appellate Procedure, a late filed notice of appeal should not be construed as a motion to extend the time for filing notice.

Petitioner cites several court of appeals cases, from before 1979, which construed late filed notices of appeal as requests for extension. Petitioner correctly points out that the courts of appeal have, for the most part, abandoned this practice

since 1979. The reason is clear. The 1979 amendment to Rule 4(a)(5) was adopted for the purpose of requiring that an application be made by motion. Merely filing a notice of appeal within the time for an extension is plainly insufficient under the rule. Only a tortured reading could permit a late filed notice of appeal to be construed as a motion for extension. This was not the case under the pre-1979 rule, cited at page 34 of Petitioner's brief. Only a "request for extension" was required. Under the present Rule 4, a "motion" is required. See Advisory Committee Note to 1979 Amendment to F.R.A.P., 4(a)(5). The clarity of this Rule promotes finality in litigation as well as a definite rule as to what must be done to obtain an extension. If this Court had intended that any notice of appeal filed within sixty days would be effective, the rule would have said so. Under its plain terms, nothing except a

motion to extend can be construed to fulfill the rule's requirements. Finally, where a notice of appeal is to have an effect beyond its normal function, the Federal Rules of Appellate Procedure specifically so provide. See F.R.A.P. 22(b) (Notice of appeal in 28 U.S.C. § 2254 case operates as a request for a certificate of probable cause to appeal.)

F. It is neither inequitable nor unfair to hold Petitioner to the requirements of the rule.

The amici States submit that it is neither unfair nor inequitable to hold habeas corpus petitioners, even those who are pro se, to the jurisdictional rules. They are not subject to exception outside the most unusual of circumstances. See Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251 (1986); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982); Browder v. Director, Illinois Department of Corrections, 434 U.S. 257

(1978). They are specifically applicable to habeas corpus cases. Browder. It is particularly appropriate, however, to apply rules designed to promote finality in cases under 28 U.S.C. § 2254.

The amici States have a strong interest in finality of their criminal judgments. Federal habeas corpus inevitably interferes with this interest. The State courts are bound by the United States Constitution and laws to the same degree as are the federal courts, and have granted, in some cases, greater protection to criminal defendants. Compare State v. Opperman, 247 N.W.2d 673 (1976) with South Dakota v. Opperman, 428 U.S. 364 (1976). See also Stone v. Powell, 428 U.S. 465, n. 31 at 491 (1976). Federal habeas corpus, however, arises only after the state's entire judicial system has considered the matter, and the petitioner has exhausted all remedies available to him in the state

courts. See Rose v. Lundy, 455 U.S. 509 (1982). The matter then is frequently reconsidered, either with or without an evidentiary hearing, by a single United States district judge, after which appeals may be had to the court of appeals. Frictions between federal habeas courts and state courts (which have already considered the same facts and points of law) are inevitable. Because of this natural friction, and because sensitive questions of federal/state relations frequently are raised by habeas corpus litigation, the States submit that they are entitled to at least as much consideration as are private litigants in the enforcement of procedural and jurisdictional rules of the federal courts. See Bator, Finality and Criminal Law, 76 Harv. L. Rev., 441, 503-507 (1963).

Petitioner would seek to have his status as prisoner grant him privileges that were

not granted to the state by this Court Browder, supra, and have not been accorded to private litigants. To some extent, the courts have indulged the pro se prisoner litigant, in order to assure access to a remedy. See Haines v. Kerner, 404 U.S. 519 (1971) reh'g denied, 405 U.S. 948 (1972). There should be, however, limits to the special privileges that pro se status confers and one of these is certainly that no relief can be granted by an appeals court without jurisdiction to hear the prisoner's case. The purpose behind the liberal construction rules of Haines is to give pro se litigants equal access; it is not meant to provide them with unfair advantages. A pro se prisoner should not be permitted to use that status to essentially confer jurisdiction where none exists.

The amici States would also point out that it is not inherently unfair to enforce the appellate rules in this case. The

district court would have jurisdiction to consider a Rule 60(b) motion for relief from the judgment, as Respondent argues. The judgment could be modified (in this case by vacation and reentry) if Petitioner can show excusable neglect or a number of other causes for its modification, F.R.C.P. 60(b). According to the Advisory Committee Notes, 1946 Amendment to Rule 60(b), this rule was intended to cover the field of relief from judgment. It is the preferred method for relief from the effects of a judgment. This rule remains open to Petitioner at this time. Certainly, where the Petitioner has an additional avenue to pursue, he has even less grounds for requesting an exception to the jurisdictional rules of F.R.A.P. 3 and 4. In light of the fact that exceptions to the jurisdictional requirement of the timely filing of notice of appeal are rare indeed, Petitioner's alternate remedy renders his

situation even less exceptional than it would otherwise be.

CONCLUSION

The amici States hereby request that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Dated this 1st day of April, 1988.

Respectfully submitted,

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APPENDIX

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